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In The
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1977

No. 77-1659

THE CHASE MANHATTAN BANK, N.A. and
CITIBANK, N.A.,

Petitioners,

v.

THE FINANCE ADMINISTRATION OF THE CITY
OF NEW YORK AND THE FINANCE ADMINISTRATOR
OF THE CITY OF NEW YORK,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE COURT OF APPEALS OF THE STATE OF
NEW YORK

RESPONDENTS' SECOND SUPPLEMENTAL BRIEF

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RESPONDENTS' SECOND SUPPLEMENTAL BRIEF

This brief relates to material not available or involved at the time of the filing of our other briefs in opposition.

It is occasioned by the brief submitted by the Solicitor General at the invitation of this Court.

That brief embraces the views of the petitioners in these cases and it also suggests that the cases be disposed of by an unconditional summary reversal. In our brief in opposition we stated our position very briefly because we thought and still think that the petition for a writ of certiorari should be denied or if granted, would be the subject of oral argument. We also set forth in that brief, a short summary of our position on the merits. We now feel that we must expand one of our points so that a summary reversal is forestalled.

In the Court of Appeals our first and longest point was to the effect that the law in question, New York Laws of 1970, Ch. 166,

was not in effect prior to the federal legislation but became effective after December 24, 1969. The Court of Appeals held the tax to be proper because the 1970 legislation constituted the affirmative legislative action required by the federal statute. But that Court did not consider the first point of our brief, the point we are elaborating on here.

Chapter 166 became effective on April 22, 1970. Our argument was that such a law was not proscribed by Pub. Laws Nos. 91-156, 83 Stat. 434 and Pub. L. No. 92-213, §4(a), 85 Stat. 775.

Section 3 of Pub. L. 91-156, 83 Stat. 434, provided:

> "(a) Except as provided in subsection (b) of this section, prior to January 1, 1973, no tax may be imposed on any class of banks by or under authority of any State legislation in effect prior to the enactment of this Act unless * * *"
> (Underscoring supplied)

If the law in question became effective after December 24, 1969, as it did, it clearly did not impose a tax on the banks by or under authority of State legislation in effect prior to the enactment of the federal statute.

The tax involved in this case was not enacted, as taxpayers would have the Court believe, pursuant to the authority of chapter 257 of the Laws of 1963 but was enacted pursuant to Chapter 166 of the Laws of 1970. While it is true that chapter 166 amended the 1963 law, the tax authorized by the 1963 law was limited by the amendment, to the periods June 1, 1963 to May 31, 1970 and to the rates for that period which it set forth (2 1/2% - 5%). The tax involved here is for the period beginning June 1, 1970 and

is imposed at rates entirely different (2 1/2% - 7 1/2%) from those authorized prior to that date. Authority for its imposition was effected by adding entirely new language to the old 1963 law. The pertinent part of chapter 166, which demonstrates that the tax for the period involved here was entirely new is quoted below, with underscoring of the language added to subdivision 1 of section 1 of the earlier law by the 1970 law:

> "Notwithstanding any other provision of law to the contrary, any city having a population of one million or more is hereby authorized and empowered to adopt and amend local laws imposing in any such city a tax such as the legislature has or would have the power and authority to impose on persons occupying premises in such city for the purpose of carrying on or exercising any trade, business, profession, vocation or commercial activity, measured by the rent paid for the use or occupancy of such premises, but, for periods embraced in the period beginning June first, nineteen hundred sixty-three and ending May thirty-first, nineteen

hundred seventy, not to exceed two and one-half percentum of such rent where the rent is not in excess of twnety-five hundred dollars per year or where the rent is for a period of less than one year and would not exceed twenty-five hundred dollars for the year if it were paid on an equivalent basis for the entire year and not to exceed five percentum of such rent where the rent is in excess of twenty-five hundred dollars per year or where the rent is for a period of less than one year and would exceed twenty-five hundred dollars for the year if it were paid on an equivalent basis for the entire year. For periods beginning after May thirty-first, nineteen hundred seventy such tax shall be imposed at the rates shown in the following table. Where the rent is for a period of less than one year, the rate shall be determined by assuming that the rent is on an equivalent basis for the entire year.

Where the annual rent is:	But not more than:	The rate shall be:
0	$ 2499	2 1/2% of the rent
$ 2500 or over	$ 4999	5% of the rent
$ 5000 or over	$ 7999	6 1/4% of the rent
$ 8000 or over	$10999	7% of the rent
$11000 or over		7 1/2% of the rent"

It can thus be seen that the last two

sentences underlined above, authorized the tax with which we are dealing and were not in effect prior to the enactment of the federal legislation.

The City's local law, enacted pursuant to the 1970 State law, Local Law No. 20 for the year 1970, amended paragraph (1) of §L46-2.0 of the Administrative Code of the City of New York so that it imposed a tax:

> "For each tax year commencing on or after June first, nineteen hundred sixty-three and ending on or before May thirty-first, nineteen hundred seventy * * *".

That Local Law also added a paragraph (2) which read:

> "For each tax year commencing on or after June first, nineteen hundred seventy every tenant shall pay a tax at the rates shown in the following tables * * *".

Thus, even the local law separated the taxes for the period before June 1970 and for the period following. It is the above quoted

paragraph of the local law relating to 1970 and thereafter which was enacted pursuant to the authority granted by chapter 166 of the Laws of 1970, no part of which was in effect before the enactment of the Congressional legislation. It follows that the requirement for affirmative legislative action upon which taxpayers build their cases has no application to the taxes involved here. The condition precedent to that requirement has not been met; the tax was not authorized by a law effective prior to the federal legislation.

Authority for the maximum tax of 7 1/2% did not exist under the 1963 legislation. There was no authority to impose taxes at the higher rates which were authorized by the 1970 law. So that when the banks were presented with a determination calculated at the new higher rates for June 1970 to May

1972 that determination was made pursuant to the authority of a law not "in effect prior to the enactment" of the federal law, and not pursuant to the authority of the 1963 law. The authority to tax for 1970 and the following years was not in effect prior to the enactment of the federal law.

The amendment of the 1963 enabling act in 1970 had the effect, we believe, under the New York cases, of republishing and re-enacting the original act. At the very least, whether this was the effect of the amendment is a question for the Court of Appeals to determine, namely, did the 1970 Act constitute a re-enactment of the earlier Act. We shall discuss the New York cases on the question of re-enactment after we demonstrate the formalistic quality of the taxpayers' attack. The formalism can be illustrated by a hypothetical situation.

If, instead of enacting chapter 166 and amending the 1963 act, the legislature in 1970 had amended the 1963 act simply to end its period of applicability on May 31, 1970 and had enacted a new and separate enabling act precisely the same as the 1963 law except for higher rates, making the new act applicable on or after June 1, 1970, it would have accomplished precisely the same thing as it did in enacting chapter 166. Yet no one could possibly assert then that the tax in question here was imposed "under authority of any state legislation in effect prior to the enactment" of the federal act. The new and separate 1970 legislation would have been the only legislation authorizing the tax. There would have been no need for mentioning national banks in it. Nor would there have been any need for affirmative legislative action even if that action would have of

necessity been involved.

Because the legislature accomplished the same thing with less verbiage, we are told that the tax authorized for the later period at the higher rates was really imposed pursuant to the 1963 enabling act. It could not possibly have been imposed pursuant to that act which authorized only the old lower rates. For its imposition, it was necessary that the City have new legislation, and that legislation did not go into effect until after the federal provisions were enacted.

Other examples illustrate our point. The 1963 enabling act (L.1963, ch.257), in paragraph d of subsection 3 of its §1, provided that it did not authorize imposition of a tax on non-profit organizations operated for charitable, religious or educational purposes. Assume that in 1970 the legislature

amended this provision to strike out the word "educational" and to transpose the "or" and that the local law was similarly amended. Could it be said that the tax on educational institutions was authorized by legislation in effect since 1963? Of course authorization would have come in 1970 when the 1963 law was amended.

The effect of this Court's decision in Agricultural Bank v. Tax Comm'n., 392 U.S. 339 (1968) was precisely the same as if the 1963 enabling act had included a provision that it did not authorize imposing of a tax on national banks. The enactment of the 1970 legislation, since it made no reference to national banks, was analagous to the illustration in the preceding paragraph which struck out "educational".

The effect of an amending law on the law which it amends raises a question of state law. The amendment of the earlier statute is a re-enactment of that statute under the New York cases. The Court of Appeals did not consider this question because it held the tax to be valid on other grounds. We believe that, if certiorari is granted and the judgment is reversed, it should be a reversal with a remand to the Court of Appeals for determination of this question.

Remand of this kind to a state court is well illustrated by the case of Greyhound Lines v. Mealey, 334 U.S. 653 (1948). In that case the New York Court of Appeals had initially held that the receipts of a bus company for transportation between two points in New York State, the route of which passed through both

Pennsylvania and New Jersey, were not receipts from interstate commerce and were fully taxable. Central Greyhound Lines v. Mealey, 296 N.Y. 18; 68 N.E. 2d 849 (1946).

On appeal to this Court the judgment of the Court of Appeals was reversed. However, this Court noted that the tax statute involved was susceptible of a constitutional construction if it fairly apportioned the tax to the business done within the state, and remanded the case for determination of whether apportionment was authorized under the statute. On remand and reargument, the Court of Appeals held that the statute was susceptible of mileage apportionment and thus upheld an apportioned tax. Central Greyhound Lines v. Mealey, 298 N.Y. 876; 84 N.E. 2d 801 (1949).

This case presents a similar question. The other cases cited at page 8 of our brief in opposition, Spector Motor Co. v. McLaughlin, 323 U.S. 101 (1944) and N.A.A.C.P. v. Button, 371 U.S. 415 (1963) are analagous holdings.

Although the question of the effect of the amendment of an earlier law is one for the New York Court of Appeals to answer, we shall briefly quote from the cases which support our view, and demonstrate that our request for possible remand is founded upon authoritative decisions of that Court and is meritorious.

In People v. Wilmerding, 136 N.Y. 363; 32 N.E. 1099 (1893) the Court said: (p.368)

> "There is also another rule well established in this court which declares that a statute declaring a former statute to be thereby amended so as to read as prescribed in the amending act, is not a repeal of the original statute, and that from the time of the

> passage of the amendatory act such act is the only enactment on the subject as to future transactions, and the former statute is merged and lost in, and has no vitality distinct from, the amendatory act. And it has been held that a repeal of the amendatory act does not revive the original act, but both fall by virtue of the repeal of the later act. (Underscoring supplied).

And commenting on the case of People v. Supervisors, 67 N.Y. 109; 23 Am. R. 94 (1876) the Court said (p.369):

> "It was there distinctly decided that an earlier statute which was amended and re-enacted in the shape of an amendment, so as to read as prescribed in the later amendatory statute, was thereby wholly annulled as to all future cases and became merged and incorporated into the later statute."

People v. Supervisors, 67 N.Y. 109; 23 Am. R. 94 (1876) upon which Judge Peckham relied on deciding the Wilmerding case, is very similar to Wilmerding.

The Court of Appeals, in that case, said (p.118):

> "Although the former act remains upon the statute book and is not repealed, either expressly or by implication, it is no longer the law of the land in respect to new cases that may arise. In the case before us, the substance and body of the act of 1867 was incorporated in and made part of the act of 1873 * * * "

And later (p.370):

> "* * * enactment of the later statute of 1866 by reason of the language used in the first section thereof, did thereby incorporate into it all the life and force of the first section of the act of 1846, so that the later act stood from that time and as to all future cases as the sole and only exponent of legislative intent and power upon the subject and such act thereby utterly blotted out and annihilated the earlier statute, except as to rights or duties already existing."

In Matter of Rochester Water Commissioners, 66 N.Y. 413 (1876)* the Court of Appeals held that the portion of the statute which is amended by a later statute which repeats its

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* Not reported unofficially.

language and adds to it is re-enacted. The Court stated (p.421):

> "The intent to continue the original section in force, with this new clause added, is made more apparent by reference to chapter 39 of the Laws of 1875, passed five days thereafter, which re-enacts section 23 of the act of 1872, with section 23 of chapter 33 of 1875 added to it." (Underscoring supplied)

(3)

For the reasons stated in our prior briefs, we again ask that certiorari be denied. However, if the Court should incline to grant a writ, with the summary reversal which the Solicitor General suggests, we ask that the case be remanded to the Court of Appeals for determination of the state question outlined in this brief.

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